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by KENNETH L. SHROPSHIRE*

Introduction

Recently, the National Collegiate Athletic Association (NCAA) has received a great deal of negative publicity regarding its regulation of college sports.[1] Many believe that competition for the ever increasing profit opportunities in college sports is the root of the "evil" in the NCAA.[2] Unfortunately, there is growing evidence to support this reasoning. Consider that a first round appearance in the 1987 NCAA Men's Division I Basketball Tournament guaranteed each participating

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1. Nearly 30 schools are currently subjected to some NCAA sanction. *See 26 Institutions Under NCAA Sanctions,* The Chron. of Higher Educ., May 25, 1988, at A38, col. 1. Among other things, intercollegiate athletics has been said to be "commercialized to the point that it was little more than a big business masquerading as an educational enterprise." Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 994 (1987).

2. *See* Smith, *supra* note 1, at 985, quoting United States Representative Thomas Luken of Ohio, who stated:

> The unhappy fact is that the NCAA is not primarily concerned about kids who pass through its sports factories. Athletics departments are expected to be financially self-sustaining, so the profit motive supercedes any concern for the intellectual development of the athletes. This breeds a corrupting and destructive drive to win, regardless of the emotional, spiritual or educational cost to the student. The hope of meaningful reform within the NCAA is chimera.

Id. (quoting NCAA News, Nov. 3, 1986, at 2, col. 2 (citing N.Y. Times, Oct. 4, 1986, at 23, col. 1)).

Commercialization is not a recent phenomena. For example, in the mid-1800's there was a regatta between Harvard and Yale Universities sponsored by a corporation, with prize money awarded. *See* Smith, *supra* note 1, at 988-89.

NCAA member institution[3] $239,635.[4] Consider further that the Big Eight Conference,[5] with two conference schools among the final four teams in that tournament, received $3,834,155.[6]

The pressure on schools to take extraordinary steps to win, including "illegal"[7] cash payments to recruit high school sports stars, is well documented.[8] This problem has further manifested itself in the growing concern of NCAA member institutions and conferences over which teams will be selected by the designated NCAA committees[9] to participate in championship tournaments.[10] In reaction to his school not being selected to

3. Each college or university that is a member of the NCAA is commonly referred to as a member institution. NCAA CONST. art. IV, § 3(a), NCAA MANUAL 1988-89, at 32-33 (1988).

4. *See* Gretz, *NCAA Shouldn't Tamper With Final Four Success,* The NCAA News, Aug. 17, 1988, at 5 (excerpted from a column in The Kansas City Star). In the most recent NCAA basketball tournament, the teams reaching the final four were projected to receive $1.15 million. USA Today, Mar. 14, 1988, § E, at 6.

5. The member institutions are organized into various conferences and most compete in some manner for their own conference championship.

6. *See Tournament Revenue Exceeds Estimate,* The NCAA News, July 6, 1988, at 3. A portion of the earnings from these tournaments are retained by the NCAA for operating expenses. G. WONG, ESSENTIALS OF AMATEUR SPORTS LAW 3 (1988). Approximately 90% of 1987 NCAA revenues will come from various championships. *See Executive Committee Approves Record Budget,* NCAA News, Sept. 14, 1987, at 1.

7. Although these payments are often referred to as illegal, they are actually only in violation of NCAA rules, and do not violate the laws of the United States or most states. *See* NCAA CONST. art. III, § 1(a), NCAA MANUAL 1988-89, at 9-10 (1988).

8. *See, e.g.,* Wulff, *A Surprise Package,* SPORTS ILLUSTRATED, Apr. 25, 1988, at 15 (citing the alleged payment of $1000 to a high school recruit by a University of Kentucky assistant basketball coach); Sullivan & Neff, *Shame on You, SMU,* SPORTS ILLUSTRATED, Mar. 9, 1987, at 18 (discussing payments by a booster club member with the approval of members of the SMU athletic staff to student athletes).

9. The NCAA constitution provides that an appropriate sports committee select the member institutions for various post season competitions. A designated sports committee selects a games committee under the guidelines of the NCAA Executive Regulations. NCAA CONST. art. V, § 8, NCAA MANUAL 1988-89, at 48-49 (1988). The selection entity will be referred to hereinafter as the "Selection Committee."

10. *See* Howard Univ. v. NCAA, 675 F. Supp. 652 (D.D.C. 1987); Kirkpatrick, *A Terrible Omission—Louisville Deserved a Chance to Defend Its Title,* SPORTS ILLUSTRATED, Mar. 16, 1987, at 74; Carey, *New Mexico Disappointed for 2nd Year,* USA Today, Mar. 14, 1988, at E1, col. 2; Shuster, *Wild, Wild West Voices Its NCAA Complaints,* USA Today, Mar. 17, 1988, at C3, col. 1. Louisville head basketball coach, Denny Crum, whose team was selected in the 1988 tournament, but not in 1987, has stated that "[i]t doesn't allow the selection to be totally objective because there is so much subjective input. I think we need to go to a little more computerized system that involves everything you can put into a computer, then give the committee a little leeway at the end." USA Today, Mar. 14, 1988, at E1, col. 1. The importance of the revenues has already manifested itself in the NCAA's decision to keep the NCAA Division I Basketball Tournament field at 64, rather than increasing it as had been proposed, thereby preventing a further division of tournament revenues. *See*

participate in an NCAA championship tournament, the president of Howard University brought suit against the NCAA and said, "This is not a skirmish . . . [t]his is all-out warfare."[11] This university president felt that the NCAA's failure to include his institution's team in the tournament was inexcusable.[12] Seemingly, his concern was that, by not being selected to participate in the championship tournament, his institution would lose the opportunity to earn thousands of dollars in revenues.[13]

In the past, both member institutions and student-athletes have embroiled the NCAA in litigation.[14] Most of these actions have revolved around issues of antitrust and constitutional law.[15] Member institutions have also brought breach of

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Sports Industry News, Aug. 26, 1988, at 271. Obviously, limiting the number of participants in the fields also maintains the high quality of competition in the tournament. *Id.*

11. *Howard U. Battles NCAA Over Grid Playoff Snub,* JET, Dec. 14, 1987, at 50. Howard University is an historically black institution located in Washington, D.C. This comment indicates the dramatic transformation in the perceived value of postseason play. Jim Hull, captain of the 1939 Ohio State University basketball team, recalls being invited to the first NCAA basketball tournament: "We didn't want to go!" he laughed. "We had just won our league title, which was the most important thing in our minds, and the state high school tournament was being played. We wanted to watch that tournament. We didn't even know what the N.C.A.A. tournament was." Schultz, *Final Four Makes Sense . . . and Dollars,* N.Y. Times, Mar. 20, 1988, § 8, at 10, col. 2. The first tournament lost $2,500. *Id. See also* Howard Univ. v. NCAA, 675 F. Supp. 652 (D.D.C. 1987).

12. *See supra* note 11 and *infra* notes 114-25 and accompanying text (comparing Howard University's record with those of institutions selected to participate in the tournament).

13. *See supra* note 4. In addition to revenues, there is certainly the unqualifiable benefit of the school being considered "big time."

14. *See, e.g.,* NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984) (upholding the plaintiff-university's claim that the NCAA's television policy violated the Sherman Act); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (upholding the NCAA's limitation as to the number of assistant coaches which a Division I school could employ in its football and basketball programs as permissible under antitrust law); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975) (invalidating the NCAA's foreign student rule, under which foreign student athletes were penalized for activities in which American athletes could freely compete, as an unconstitutional alienage classification, *id.* at 222, but upholding the NCAA's rules regarding eligibility and minimum grade point average, characterizing the rules as reasonable and permissible under the equal protection clause, *id.* at 221); Trustees of the California State Universities and Colleges v. NCAA, 82 Cal. App. 3d 461, 147 Cal. Rptr. 187 (1978) (upholding an injunction which prevented the NCAA from imposing sanctions on a university that had followed a common interpretation of a freshman eligibility rule).

15. *See, e.g.,* McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988) (court denied plaintiff's claim that NCAA supension of Southern Methodist University's football program for two years violated antitrust law); Association for Intercollegiate

contract actions against the NCAA, although less frequently.[16] In light of the recent expansion of the damages a successful plaintiff may be awarded in certain breach of contract cases, as well as the uncertainty of success in any legal action, an examination of the potential contract actions is useful.[17] This Arti-

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Athletics for Women v. NCAA, 735 F.2d 577, 584-90 (D.C. Cir. 1984) (AIAW's claim that the NCAA unlawfully used its monopoly power in men's college sports to facilitate its entry into women's college sports and force AIAW out of existence was denied); Spath v. NCAA, 728 F.2d 25, 29 (1st Cir. 1984) (court refused to uphold plaintiff's claim that NCAA rule which took away one year of his eligibility without a formal hearing violated his constitutional right to due process); Wiley v. NCAA, 612 F.2d 473, 477 (10th Cir. 1979) (court dismissed claim that NCAA had violated plaintiff's rights under the equal protection clause); Parish v. NCAA, 506 F.2d 1028, 1034 (5th Cir. 1975) (court held that NCAA rules governing student eligibility did not deprive plaintiffs of a liberty or property interest).

16. *See, e.g.,* California State Univ., Hayward v. NCAA, 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1975) (University successfully asserts that the NCAA constitution and bylaws constitute the contract between them). *Id.* at 541, 121 Cal. Rptr. at 89.

17. Obviously, if time permitted, the initial action by a member institution in a tournament selection case would be for an injunction or other legal action to compel their admission to the competition. A successful action at this level would negate the need to pursue further litigation. However, the time between the selection of the teams and the beginning of the competition is generally quite brief. Howard University was recently denied temporary injunctive relief despite the merits of its case because the harm that would come to institutions already selected and others would be greater than the existing harm to Howard. Howard Univ. v. NCAA, 675 F. Supp. 652, 654-55 (D.D.C. 1987). Thus, even a strong case seeking an injunction may be unsuccessful. *See also infra* notes 114-129 and accompanying text.

The uncertainty of success in a legal action is particularly clear in the NCAA antitrust and constitutional action. In the antitrust cases, to find collusion, as required under the Sherman Act, two actors are required. The antitrust actions in sports always run the risk of a successful "single entity" defense. The selection of tournament participants may be one activity for which the defense should be valid. A higher degree of cooperation is obviously necessary to conduct a championship tournament. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), which held that the "coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." *Id.* at 771. Thus, a successful argument analogizing the NCAA as the parent and a member institution as the subsidiary may bar such an action. *But cf.* NCAA v. Board of Regents, 468 U.S. 85 (1984), where the argument was not successful. *See also infra* notes 106-43 and accompanying text (for discussion of the breach of contract theory).

The constitutional actions often require a finding that the NCAA is a "state actor." Recent cases indicate that such a finding cannot be taken as a given. *See, e.g.,* NCAA v. Tarkanian, 57 U.S.L.W. 4050 (U.S. Dec. 12, 1988) (holding that the NCAA's participation in the events that led to the suspension of a state university head basketball coach for violating NCAA rules did not constitute "state action"), *rev'g* 741 F.2d 1345; Rendell-Baker v. Kohn 457 U.S. 830 (1982) (holding that a private school's operation is not traditionally an exclusive state function); Graham v. NCAA, 804 F.2d 953, 957-58 (6th Cir. 1987) (holding that the NCAA's promulgation and application of rules do not constitute "state action"); Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984) (holding that the NCAA's adoption of an eligibility rule was not a "state ac-

cle will focus on the propriety of a breach of contract action, and the potential remedies available in the situation where a member's team has been "wrongfully" excluded from tournament competition.[18]

Potential damage awards for breach of contract may, in certain circumstances, go beyond compensation for foreseeable expectation losses.[19] Some courts are recognizing that under unique circumstances, punitive damages may be appropriate.[20] Although the guidelines for awarding punitive damages are not clearly defined, there are three factors that courts may consider applicable in the NCAA and member institution relationship.[21] First, some courts have held that a party breaching in "bad faith"[22] should be punished and not merely forced to pay compensatory damages. Apparently, the primary objective of this measure is to deter bad faith breaches by imposing substantially greater than traditional economic costs for breach of contract.[23] Second, courts have deemed that where a fiduciary relationship exists, closer scrutiny of a contract breach is appropriate.[24] Finally, where there is a chance of "undercompensation" if only compensatory damages are awarded, punitive damages may be an appropriate vehicle to redress fully the harm suffered by a plaintiff.[25]

The selection of participants for championship tournaments may, in some instances, be subjective. The decision to invite a school to tournament competition can be characterized as one

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tion"); O'Halloran v. University of Washington, 679 F. Supp. 997, 1002 (W.D. Wash. 1988) (holding that the enforcement of the NCAA's drug-testing program was not under color of state law). Professors Weistart and Lowell note that the majority of actions brought alleging violations of constitutional due process rights are unsuccessful. J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 5.12, at 184-85 (1979 & Supp. 1985).

18. *See infra* notes 104-43 and accompanying text.

19. *See infra* notes 185-220 and accompanying text.

20. *Id.*

21. *Id.*

22. *See infra* notes 185-96 and accompanying text.

23. *Id.*

24. *See infra* notes 197-209 and accompanying text.

25. *See* Sebert, *Punitive and Nonpecuniary Damages In Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1647-54 (1986). The discussion in notes 149-84 and accompanying text sets forth that the standard measure of "expectancy" in contract may well fall short of the monetary benefits a member institution derives from participating in a championship tournament. For example, traditional contract damage measures do not account for the "lost exposure" of the institution to prospective student-athletes, students, faculty, and benefactors. *See infra* notes 197-209 and accompanying text.

of the following: (1) a "good" selection, such as the selection of a team ranked number one at the time it is chosen to participate in a championship tournament;[26] (2) a "questionable" selection—either the nonselection of a team commonly thought to be a viable participant, or the selection of one commonly thought to be nonviable;[27] or (3) a "bad faith" selection, where there is a conscious decision by the Selection Committee to exclude a member institution that is otherwise clearly qualified or to include a member institution that is clearly unqualified.[28]

Part I of this Article examines the role of the NCAA in college sports, the fiduciary nature of the NCAA and member institution relationship, and the development and financial rewards of NCAA National Championships. Part II discusses judicial intervention in NCAA and member institution disputes, briefly examines some of the litigation initiated by member institutions against the NCAA, and reviews some of the problems in the NCAA and member institution relationship. Part III looks at the appropriateness of applying a contract analysis to problems in the NCAA and member institution relationship. Part IV identifies how that contract may be breached and the facts of *Howard University v. NCAA*. Part V examines the application of punitive damages to NCAA and member institution disputes and the likely effect on the relationship.

This Article focuses on both the "questionable" and "bad faith" categories of decisions. It concludes that there should be no judicial intervention when a questionable decision has been made. However, where there is a bad faith decision, courts should intervene, grant compensation, and award punitive damages.

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26. The selection of number-one-ranked Temple University for the 1987 NCAA Division I Basketball Tournament is an example of this.

27. *See generally supra* note 10. *See also* Weistart, *Legal Accountability and the NCAA*, 10 J. C. & U. L. 167, 174 (1983) (noting that "[c]ases in which there are simply honest differences of opinion are those for which the internal resolutions should usually be accepted").

28. This is the case that Howard University is asserting. *See infra* notes 114-133 and accompanying text.

I
The NCAA

A. Background

The NCAA's power and authority has developed over several decades. The NCAA has grown from a safety commission in the early 1900's, to its role today as the country's foremost controller of intercollegiate athletics.[29] The Association's development began in the late 19th century when the growing popularity of American football resulted in intercollegiate competition.[30] By the end of the 19th century, college football was extremely popular,[31] but was plagued by violence and the risk of serious injury.[32] Because of these problems and numerous administrative difficulties, college football was viewed by many to be in a state of disarray.[33]

While it was common for colleges to compete against each other in football, many schools had different standards regarding player eligibility, proper equipment, and even different rules governing the game.[34] Moreover, serious injuries occurred frequently and fatalities were not unknown.[35] Despite excessive violence, rule conflicts, and administrative problems, college football continued to flourish,[36] and initial attempts to reform the game failed.[37]

As a result of the efforts of President Theodore Roosevelt, thirteen schools met in New York on December 9, 1905, to discuss the abolition of college football.[38] The group ultimately agreed to continue playing the game, but decided to invite

29. *See generally* Smith, *supra* note 1, at 993. For a history of the NCAA, see P. LAWRENCE, UNSPORTSMANLIKE CONDUCT: THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND THE BUSINESS OF COLLEGE FOOTBALL (1987); J. FALLA, NCAA: THE VOICE OF COLLEGE SPORTS (1981); N. HART-NIBBRIG & L. COTTINGHAM, THE POLITICAL ECONOMY OF COLLEGE SPORTS (1986).

30. The "first game" was played between Princeton and Rutgers on November 6, 1869. By today's standards, the game that was played resembled soccer more than it did rugby or football. J. FALLA, *supra* note 29, at 6.

31. *Id.* at 7-9.

32. *Id.* at 8-9.

33. *Id.*

34. *See* P. LAWRENCE, *supra* note 29, at 7.

35. The 1905 season produced 18 deaths and 149 serious injuries. J. FALLA, *supra* note 29, at 13.

36. *Id.*

37. *Id.* at 11.

38. P. LAWRENCE, *supra* note 29, at 7-8; J. FALLA, *supra* note 29, at 13.

other schools to join them in making safety reforms.[39] On December 28, 1905, sixty-two schools met and formed the Intercollegiate Athletic Association of the United States.[40] This Association immediately began to standardize the rules for intercollegiate football.[41] These standardized rules outlawed violent play in the hopes of preventing injury.[42]

In 1910, the organization was renamed the National Collegiate Athletic Association.[43] By 1941, the NCAA had grown to 252 members.[44] As membership in the NCAA increased, there was a corresponding growth in the NCAA's influence over college sports.[45] Rules committees were established for other intercollegiate sports, including baseball, basketball, boxing, fencing, golf, gymnastics, ice hockey, lacrosse, soccer, swimming, tennis, track and field, volleyball, and wrestling.[46] In addition to regulating the rules of each sport, the NCAA began to regulate player eligibility, scheduling, recruiting, and eventually the administration of national collegiate championship tournaments.[47] Today, the NCAA plays a major role in the governance of the athletic programs of over 1000 member institutions.[48]

As this growth occurred, member institutions began to rely increasingly on the NCAA to represent their individual interests.[49] The key to the NCAA's power was, and is today, the

39. J. FALLA, *supra* note 29, at 14. At this point, Columbia and Northwestern had suspended play of football, Berkeley and Stanford had substituted rugby for football, and Harvard's president was threatening the abolition of the game. *Id.*

40. *Id.* at 14-15.

41. P. LAWRENCE, *supra* note 29, at 9-10.

42. *Id.* at 11. As the Association's membership grew, schools which had been successful by using excessive violence no longer feared losing a competitive advantage in adopting standardized rules since all opponents had to play under the same set of rules, thereby further encouraging membership growth. *Id.*

43. *See* J. FALLA, *supra* note 29, at 36.

44. P. LAWRENCE, *supra* note 29, at 13.

45. *Id.* at 20-21.

46. *Id.* at 20. By now, the NCAA had established itself as a "national sports body." *Id.* at 15.

47. *Id.* at 20; J. FALLA, *supra* note 29, at 176.

48. *See Membership In Association Reaches All-Time High (1,020),* NCAA News, Aug. 31, 1988, at 1, col. 3. *See also* G. SCHUBERT, R. SMITH & J. TRENTADUE, SPORTS LAW 2 (1986).

49. It should be noted, however, that there is a strong secessionist movement in the NCAA led by the College Football Association (CFA). The CFA has considered expanding its role in college sports beyond football to "all intercollegiate athletics." NCAA News, Oct. 13, 1986, at 4, col. 3. *See also* Koch, *The Economic Realities of Amateur Sports Organization,* 61 IND. L.J. 9, 23 (1985).

revenues from its share of television contracts, championship tournaments, and its right to impose sanctions on member institutions that violate NCAA rules.[50] The long time Commissioner of the Big Ten Conference, Wayne Duke, stated that the keys to the success of the NCAA are "enforcement, football on television and the [NCAA Division I] basketball tournament."[51]

The fact that many Association-wide contracts are negotiated by NCAA officials causes member institutions to rely on the negotiating abilities of the NCAA. In this way, individual schools must rely heavily on the NCAA to aid their schools in reaping a financial gain from their athletic programs. In championship tournaments, there is reliance on the NCAA not only to negotiate the most profitable agreement possible regarding television and other revenues, but also to select the proper teams for the tournament.[52]

As in many situations where large amounts of money and prestige are involved, the process of selecting teams for tournament appearances has been the subject of allegations of bias and prejudice. Recent litigation has alleged that the selection process, in some circumstances, may be tainted by the self-interest of Selection Committee members.[53] Some have even alleged that there was a racially discriminatory selection process.[54] This Article does not seek to resolve the truth of these allegations, but merely examines the remedies available if there are "questionable"[55] or "bad faith"[56] decisions in the selection process.

If a college in the United States desires to compete in big time college sports, the NCAA is the most viable option.

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50. *See* Smith, *supra* note 1, at 993.

51. *See* McCallum, *In the Kingdom of the Solitary Man*, SPORTS ILLUSTRATED, Oct. 6, 1986, at 70. The 1987-88 Division I Men's Basketball Championship projected revenues were to account for 81.2% of all NCAA revenues. *Executive Committee Approves Record Budget*, NCAA News, Sept. 14, 1987.

52. *See infra* notes 104-43 and accompanying text.

53. *See, e.g.*, Application for Temporary Restraining Order and Motion for Preliminary Injunction at 11, Howard Univ. v. NCAA (No. 87-3206), alleging the selection committee "imposed irrational, arbitrary and racially discriminatory criteria." These allegations have been denied by the NCAA. *See* Defendant NCAA's Memorandum in Opposition to Plaintiff's Application for Temporary Restraining Order at 4, Howard Univ. v. NCAA (No. 87-3206).

54. *See, e.g.*, Application for Temporary Restraining Order and Motion for Preliminary Injunction, *supra* note 53.

55. *See supra* note 27 and accompanying text.

56. *See supra* note 28 and accompanying text.

Although a few other entities regulate various sectors of college sports, none wield the financial power of the NCAA.[57] Professor Weistart, a leading sports law scholar, has labeled the control that the NCAA has over college sports, and therefore over the member institutions, as "monolithic."[58] This monolithic power, coupled with the trust placed in the NCAA by member institutions, creates a fiduciary relationship between the NCAA and member institutions.[59] Weistart also notes that, in a general sense, when a regulator such as the NCAA has exclusive control over a process such as tournament selection, the deliberative qualities of the body may be affected: "As participants individually have few options, the organization has reduced incentives for careful deliberation. If the deliberative process is imperfect, there is an enhanced probability that its products will have that same characteristic."[60] One area where this fiduciary trust is placed in the NCAA is in the conduct of national championship tournaments.[61]

B. NCAA National Championships

In the closing address of the thirteenth NCAA convention in 1919, the NCAA president suggested to the convention that "college athletes of the United States possibly might meet in competition for the various national championships."[62] The next year, the executive committee of the NCAA met and discussed the feasibility and benefits of a national championship competition.[63] At the following convention, the president told the convention that the executive committee had decided to support a national competition in hopes "that such a national contest would act as a stimulus to field sports and track events throughout the whole length and breadth of the land, and by actual competition determine the national championship."[64]

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57. *See* J. WEISTART & C. LOWELL, *supra* note 17, at 760.

58. Weistart, *supra* note 27, at 171.

59. *Id.* at 173. For a general discussion of fiduciary law see Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983); *see also infra* notes 197-209 and accompanying text.

60. Weistart, *supra* note 27, at 172.

61. *See* NCAA CONST. art. V, § 8, NCAA MANUAL 1988-89, at 48-49 (1988).

62. Falla indicates that the statement was made by then President Palmer Pierce "almost as an afterthought." J. FALLA, *supra* note 29, at 176.

63. *Id.*

64. *Id.* at 177.

The first NCAA national championship was held at the University of Chicago in 1921, where sixty-two schools competed for the track and field championship.[65] Shortly thereafter, the NCAA began to sponsor championships in other sports.[66] Today, the NCAA sponsors approximately eighty championships in more than twenty sports.[67]

In addition to championship tournaments, there was a proliferation of postseason football bowl games after World War II.[68] The NCAA took interest in these bowl games because of concern over potential or actual improprieties, as well as concern regarding whether its members were receiving just compensation for their participation.[69] In 1951, the NCAA Bowl Game Committee recommended an NCAA constitutional amendment to regulate postseason competition.[70] When the convention voted to adopt the amendment, the NCAA entered a new era. More than being the guardian of the integrity of intercollegiate athletics, it was now regulating bowl games. More importantly, it was in a position to significantly affect the revenue flow of its members and itself.

The NCAA took special efforts to insure the existence of championship competition on all levels. For example, a National College Division Basketball Championship was held in 1957 and included teams that normally would not have been able to compete in postseason play with larger schools.[71] Although the Division I Men's Basketball Tournament is the largest and most profitable championship, the NCAA sponsors a variety of championships for schools of varying sizes.[72]

What the NCAA executive committee either did not realize, or could not avoid at the time, was that eventually, by select-

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65. *Id.* at 178.

66. *Id.* at 179-202. The oldest national intercollegiate championship is in tennis, conducted on grass courts on the grounds of an insane asylum in 1883. *Id.* at 177.

67. *See Bylaws and Interpretations*, art. V, § 6, NCAA MANUAL 1988-89, at 120 (1988) (citing 77 national championships).

68. In 1948, there were 50 postseason bowl games. P. LAWRENCE, *supra* note 29, at 90. See *also* G. WONG, *supra* note 6, at 6, and *College Bowl Schedule*, N.Y. Times, Nov. 21, 1988, at C9, col. 2 for bowl game revenues.

69. P. LAWRENCE, *supra* note 29, at 89.

70. *Id.* at 90.

71. Even when a computer was first used to aid in selecting participants for the NCAA Division I basketball field of 48 teams, Committee Chair Wayne Duke noted, "We'll still hear from the 49th rated team, I'm sure." J. FALLA, *supra* note 29, at 188.

72. *See supra* note 67.

ing participants for these tournaments, it was stepping into a favorite American pastime: determining which are the best teams in a given sport, sometimes without the benefit of head-to-head competition. The debate becomes even more forceful when it is time to select the teams to participate in a particular championship tournament. An issue that might better be left to the sports bars of America is decided by the administrator of the sport—the NCAA—through a designated selection committee.[73]

II
Judicial Intervention in NCAA and Member Institution Disputes

The actions of the NCAA are governed, in a broad sense, by the "doctrine of private associations."[74] A private association is frequently defined as a group of individuals who have formally organized to promote a common purpose.[75] Historically, the broad definition of private associations has included unions, political associations, and social clubs.[76] Generally, courts are reluctant to become involved in the affairs of private associations,[77] and will intervene only when there is a violation of the association's rules, where other illegality exists, or when an action is taken by the association in bad faith.[78]

This proposition was recently affirmed in *Crouch v. National Association for Stock Car Auto Racing, Inc.*,[79] a Second Circuit opinion involving the National Association for Stock

73. NCAA CONST. art. V, § 8, NCAA MANUAL 1988-89, at 48-49 (1988).

74. *See generally* Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963) [hereinafter *Private Associations*]. For a thorough discussion of this area of the law as it relates to the NCAA, see Note, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903 (1972) (authored by Kenneth J. Philpot & John R. Mackall) [hereinafter Philpot & Mackall]. The authors define a private association as "any group of individuals who have joined together in some type of formalized structure for the attainment of common purposes. . . ." *Id.* at 909.

75. *Private Associations, supra* note 74, at 985.

76. *Id.*

77. *See generally id.*; J. WEISTART & C. LOWELL, *supra* note 17, § 1.14, at 32-44. *See, e.g.*, California Trial Lawyers Ass'n. v. Superior Ct., 187 Cal. App. 3d 575, 580, 231 Cal. Rptr. 725, 728 (1986) (if a rule is not unreasonable or arbitrary, courts should exercise judicial restraint).

78. J. WEISTART & C. LOWELL, *supra* note 17, § 1.14, at 37-38; Philpot & Mackall, *supra* note 74, at 911.

79. 845 F.2d 397 (2d Cir. 1988).

Car Auto Racing (NASCAR), another private sports association. In *Crouch,* the primary issue was whether a court should interfere with a private association's interpretation of its rules.[80] In reviewing the district court opinion, Judge Meskill stated: "[W]e conclude that the district court should have deferred to NASCAR's interpretation of its own rules in the absence of an allegation that NASCAR acted in bad faith or in violation of any local, state or federal laws."[81]

Judge Meskill analogized the NASCAR situation to *Charles O. Finley & Co. v. Kuhn,*[82] where the same principle was set forth deeming it inappropriate for a court to interfere in the affairs of Major League Baseball, a private association, where no internal rules had been violated, and the league commissioner had not acted in bad faith.[83] In that case, then Oakland Athletics owner, Charles O. Finley, challenged the baseball commissioner's power to disapprove player contract assignments that the commissioner found to be "not in the best interests of baseball."[84] The Court found that the commissioner acted in good faith by adhering to the association's guidelines and, therefore, declined to intervene in the matter.[85] The court noted that whether the commissioner's action was "right or wrong" was outside the scope of their power, absent a showing that the action was "arbitrary or capricious, or motivated by malice, [or] ill will."[86]

NCAA championship tournament participant selections fall squarely within this bad faith exception. These decisions involving private associations make it clear that, generally, a court should not attempt to intercede by assessing the merits of an NCAA selection. Even questionable tournament selections made by the NCAA should not be reviewed by the courts. However, consistent with the case law that holds that court intervention is proper when an association makes a bad faith decision, courts should be able to intervene when the NCAA makes a bad faith selection decision.[87]

The fact that the selection process is final and that execu-

80. *Id.* at 400-03.
81. *Id.* at 403.
82. 569 F.2d 527 (7th Cir. 1978), *cert. denied,* 439 U.S. 876 (1978).
83. *Id.* at 544.
84. *Id.* at 532.
85. *Id.* at 539.
86. *Id.*
87. *Private Associations, supra* note 74, at 1002-04.

tive regulations of the NCAA do not permit an internal appeal makes judicial intervention even more appropriate in bad faith situations involving the NCAA.[88] Absent the right to appeal NCAA selection decisions, the appropriate avenue for an aggrieved school to plead its case appears to be in the courts.[89] Because tournament revenues can constitute a significant source of income, member institutions may choose to pursue such an action.[90] The case of football broadcast revenues is illustrative of this.

Revenues from football broadcasts have steadily increased since the 1950's. In 1962, Columbia Broadcasting System (CBS) paid the NCAA and its members $5.1 million for the right to televise a series of games.[91] By 1968, American Broadcasting Companies (ABC) was paying $16.7 million per year.[92] The last agreement between the NCAA and CBS and ABC called for the NCAA to receive $264 million in exchange for the right to broadcast games from 1982-85.[93] At the same time this agreement was being formed, a group of large schools which comprised the College Football Association (CFA) was negotiating a contract with the National Broadcasting Com-

88. The NCAA Executive Regulations state: "At no time will the Executive Committee or a governing sports committee consider an appeal of a decision of a governing sports committee, or a subcommittee designated by it, concerning selection of teams or individuals or their assignment in the championship competition . . . ." EXEC. REGS., Reg. 1, § 2(d)(5), NCAA MANUAL 1988-89, at 192 (1988). The rationale for this is apparently that there would be constant appeals as well as delays and disruptions as schools felt compelled to present their cases.

89. *See, e.g.,* Howard Univ. v. NCAA, 675 F. Supp. 652, 654 (1987). The court denied the restraining order even though it conceded the likelihood of harm to the university and its team members. *Id.* at 652.

90. *See supra* note 4 and accompanying text. An income dispute over television revenues was the impetus for previous litigation between the NCAA and member institutions. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984). The advent of television presented new problems for the NCAA and its members. In the late 1940s, some schools were receiving substantial revenues by unilaterally broadcasting their home football games. P. LAWRENCE, *supra* note 29, at 75-76. Interestingly, the overwhelming majority of schools felt that television was the direct cause of decreased attendance at live games. *Id.* at 77. As a result, the NCAA Television Committee was formed in 1950. *Id.* It recommended a moratorium on the broadcast of games for 1951 and the development of a policy to limit game broadcasts in the future. *Id.* at 75-76. The plan allowed for seven games to be shown over a ten-week period with broadcasts on Saturday afternoons. A team was limited to two appearances. The proceeds of the sale of the television rights were divided, with 40% going to the participating schools and 60% going to the NCAA. *Id.* at 78. Throughout the 1950s the NCAA made changes to accommodate regional demand. *Id.* at 82-86.

91. *Id.* at 96.

92. *Id.* at 97.

93. *Id.* at 103.

pany (NBC).[94] When the news of the contract was made public, several leaders of the NCAA made it clear that any schools that honored the CFA-NBC contract would be subject to disciplinary action.[95] The Universities of Georgia and Oklahoma, both members of the CFA, brought an antitrust lawsuit against the NCAA. They were successful in showing that NCAA control over the broadcast of college games violated the Sherman Act.[96] Although the NCAA has been embroiled in litigation involving issues ranging from athlete eligibility to the constitutionality of drug testing of student athletes,[97] the decision in *NCAA v. Board of Regents of University of Oklahoma*[98] was the association's most publicized litigation defeat.

The effects of the Court's decision have been harsh on the NCAA. The case showed the vulnerability of the NCAA to antitrust liability.[99] However, the Supreme Court recognized the need for cooperation between the NCAA and its member institutions.[100] This need for cooperation is often cited as a de-

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94. *Id.*

95. *Id.*

96. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984). The Sherman Act is codified at 15 U.S.C. § 1 (1982).

97. *See supra* note 14.

98. 468 U.S. 85 (1984).

99. *See supra* note 14.

100. 468 U.S. at 101. This case arose because of the NCAA's limit on the number of times a college could appear on television. *Id.* at 94. The broadcasts, or as the NCAA refers to them, exposures, were divided into three categories: national Division II, national Division III, and regional games. *Id.* at 93. Schools were permitted to appear on television a maximum of six times over a two-year period. *Id.* at 94. Among those exposures, only four games could be broadcast nationally, with the remainder being only regional broadcasts. *Id.* The NCAA also had an agreement with two television networks which gave each the exclusive right to broadcast games in the network television market. *Id.* at 91-93. The NCAA also sold broadcast rights to a cable television broadcaster. *Id.* at 92 n.9. Furthermore, the NCAA stipulated a minimum fee schedule by which schools received income for appearing in a broadcast. *Id.* at 92-93. However, the networks themselves had to negotiate with individual schools to actually broadcast a contest. *Id.* at 93. The Court noted that the NCAA's arrangement was similar to other restraints that had been found to be illegal per se: potential competitors had agreed to limit output (in the form of television broadcasts), and the NCAA had fixed prices by setting a minimum fee schedule (which in fact was the actual price paid to colleges by the networks). *Id.* at 99-100. Nonetheless, the Court chose not to apply a per se analysis to the NCAA's acts but to examine them under the "Rule of Reason." *Id.* at 100-04.

The Court stated that for college football to be successful, a certain level of cooperative activity was necessary. *Id.* at 101-02. Therefore, an antitrust inquiry must include a review of the justifications for the conduct of the accused party. *Id.* at 103. *See also* J. WEISTART & C. LOWELL, *supra* note 17, at 122 (1985 Supp.). Weistart and

fense by sports entities in antitrust actions.[101] This defense to an antitrust action may make a breach of contract action appropriate when problems arise in the NCAA/member institution relationship.[102]

The issue of increasingly lucrative tournament selections is inviting member institution litigation, just as the increased value of television contracts resulted in closer scrunity by member institutions.[103]

III
The NCAA/Member Institution Contractual Relationship

The terms of the contract between the NCAA and its member institutions are set forth in the constitution and bylaws of the NCAA.[104] It is well settled that "[t]he constitution, rules

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Lowell argue that the purpose of associations is "to oversee and promote the sport in question, to ensure the integrity of the events, and to adopt standards to provide the highest level of on-field competition. These goals necessarily involve collective action and definitions" (summarizing NCAA v. Board of Regents, 468 U.S. at 101-02; United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 788 (7th Cir. 1981); Gunter Harz Sports Ass'n v. United States Tennis Ass'n, 511 F. Supp. 1103, 1107-08 (D. Neb. 1981)).

The Court was unsympathetic to the proffered reasons for the restraints in question. 468 U.S. at 103. First, the NCAA argued that the arrangement was in the form of a joint venture which in fact facilitated the marketing of broadcast rights and was pro-competitive. *Id.* at 113. While the Court agreed that the NCAA does play a vital role in maintaining the integrity of college football, it held that the television plan failed to add to or maintain a competitive balance. 468 U.S. at 118-19. The Court noted:

> It seems unlikely, for example, that there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years without the NCAA's television plan. The district court found that the NCAA has been strikingly unsuccessful if it has indeed attempted to prevent the emergence of a 'power elite' in intercollegiate football.

Id. at 118 n.62 (quoting Board of Regents v. NCAA, 546 F. Supp. 1276, 1310-11 (1982)).

Given that none of the NCAA's justifications were seen as reasonable by the Court, the NCAA failed to meet the "heavy burden of establishing an affirmative defense which competitively justifies [the] apparent deviation from the operations of a free market." 468 U.S. at 113.

101. *See, e.g., id.*; United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 788 (7th Cir. 1981); Gunter Harz Sports Ass'n v. United States Tennis Ass'n, 511 F. Supp. 1103, 1115-17 (D. Neb. 1981). *See generally supra* note 17.

102. *See generally supra* note 17.

103. *See generally supra* note 10 and accompanying text.

104. NCAA MANUAL, *supra* note 3; California State Univ., Hayward v. NCAA, 47 Cal. App. 3d 533, 541, 121 Cal. Rptr. 85, 89 (1975).

and bylaws of an unincorporated association, if they are not immoral, contrary to public policy or the law of the land, or unreasonable, constitute a contract between the members which the court will enforce."[105] In *California State University, Hayward v. NCAA*, a California appellate court maintained that this general rule is applicable to the NCAA as well, stating:

> That in relation to this subject, there is no fundamental distinction between a medical association, a labor union and a fraternal or beneficial association. In each type of organization the relationship between the members and the group is determined by contract, the terms of which find expression in the constitution and by-laws. Likewise, there can be no fundamental distinction between an athletic association and the above associations where, as here, the claim is that the association failed to abide by its own rules or the laws of the land.[106]

The NCAA's championship tournament selection rules require that the selection of participants include the best eligible teams[107] and avoid any conflict of interest.[108] A violation of these provisions is arguably a breach of contract.[109]

IV
Breach of Contract

A breach of contract occurs where there is "[a]ny failure to perform a contractual duty which has arisen."[110] In *California State University, Hayward v. NCAA,* the court observed that the relationship between an athletic association and its mem-

105. *See* 6 AM. JUR. 2D *Associations & Clubs* § 8, at 435 (1963).

106. 47 Cal. App. 3d at 541, 121 Cal. Rptr. at 89 (citations omitted) (quoting Bernstein v. Alameda-Contra Costa Medical Ass'n, 139 Cal. App. 2d 241, 253, 293 P.2d 862, 869 (1956)). The action here was for an injunction against the NCAA's action declaring California State University, Hayward (CSUH) ineligible for post season play. A preliminary injunction was found to be appropriate because the NCAA action affected members of CSUH that had not violated the NCAA rule which triggered the sanction. *Id.* at 544, 121 Cal. Rptr. at 91. For a discussion of this case see Dickerson & Chapman, *Contract Law, Due Process, and the NCAA,* 5 J. C. & U. L. 107, 111-16 (1978). It is very unlikely that either party would challenge the existence of a contractual relationship. The denial of the existence of a contract has been cited as grounds for awarding punitive damages. *See infra* note 192 and accompanying text.

107. *See* NCAA EXEC. REGS. Reg. 1, § 5(g), NCAA MANUAL 1988-89, at 203 (1988).

108. NCAA EXEC. REGS. Reg. 1, § 5(i), NCAA MANUAL 1988-89, at 203 (1988).

109. *See infra* notes 110-113 and accompanying text.

110. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 12-1, at 513 (3d ed. 1987).

bers is determined by contract, the terms of which find expression in the constitution and bylaws.[111]

One of the terms in the NCAA/member institution contract is the duty to conduct championship tournaments.[112] The burden to conduct these tournaments fairly is contractually placed on the NCAA.[113] This duty includes the selection of tournament participants. Failure to properly perform this contractual duty may constitute a breach.

A. *Howard University v. NCAA*

One NCAA member institution, Howard University (Howard), brought suit when it was not selected to participate in the 1987 Division I-AA Football Championships.[114] Howard alleged that the NCAA's failure to select it as a tournament participant constituted a breach of contract and a tortious breach of good faith.[115]

Howard, as an NCAA member institution, viewed its participation in all of its scheduled contests as a member in good standing of the Mid East Athletic Conference (MEAC), as performance of its part of the NCAA/member institution contract. Howard finished the season as champion of the MEAC, a conference that does not receive an automatic play-off bid.[116] Consequently, every year the MEAC champion must compete for an at-large bid to the play-offs.[117] The NCAA Division I-AA Football Championship participants are chosen by the NCAA tournament Selection Committee. The Selection Committee chooses the sixteen most qualified teams according to availability, eligibility, and difficulty of their schedules.[118] Howard expected to be selected to participate in the tournament.[119] In the final week of the 1987 season, both Howard

111. 47 Cal. App. 3d at 541. *See also* NCAA CONST. art. V, § 8, NCAA MANUAL 1988-89, at 48-49 (1988).

112. NCAA CONST. art. III, art. V, § 8, NCAA MANUAL 1988-89, at 7-8, 48-49 (1988).

113. *Id.*

114. Howard University v. NCAA, 675 F. Supp. 652 (D.D.C. 1987).

115. Plaintiff's Amended Complaint for Declaratory and Injunctive Relief and Damages at 16, Howard University v. NCAA, 675 F. Supp. 652 (D.D.C. 1987).

116. 675 F. Supp at 653.

117. *Id.*

118. NCAA EXEC. REGS. Reg. 1, § 5(g), NCAA MANUAL 1988-89, at 203 (1988).

119. 675 F. Supp at 654. In addition, a number of commentators were dismayed at the omission. *See, e.g.*, Boswell, *Howard's Case Against NCAA Full of Merit*, Wash. Post, Nov. 27, 1987, at D1, col. 1; Kornheiser, *Howard Is Run Down by Committee*,

and North Texas State were ranked twentieth in Division I-AA.[120] Howard played the team ranked number fourteen in the NCAA poll, Delaware State, and defeated them by five points. In contrast, North Texas State defeated an unranked team with a losing record by the same five point margin.[121] Judge John Garrett Penn of the United States District Court stated: "Logic would seem to suggest that under those facts, no matter how North Texas State and Howard were ranked the following day, Howard would have the higher ranking."[122] Instead, the Selection Committee cited the relatively weak strength of the opponents Howard faced during the season and chose North Texas State to fill the final tournament spot.[123] The Selection Committee later stated that NCAA rankings were not necessarily accurate. The Selection Committee pointed out that Delaware State, which had been ranked as high as seventh in the nation during the 1987-88 season, had been undeserving of such an inflated ranking.[124] The NCAA asserted that the ranking of Delaware State as fourteenth in the final week of the season represented a compromise so that Delaware State would not drop out of the top twenty.[125]

Howard initially sought a temporary restraining order barring the championships from taking place until their case could be heard on the merits.[126] The temporary restraining order was denied, largely because of the adverse effect such a ruling would have had on the institutions that had already been selected to participate in the tournament.[127] The court was influenced by the fact that the competition schedule had been planned for over a year, a television contract had been negotiated and signed with the Entertainment and Sports Programming Network (ESPN), fans and supporters had already made their travel arrangements, and many concession operators were economically dependent on the tournament taking place on the scheduled date.[128] The court noted that, due to

Wash. Post, Nov. 24, 1987, at E1, col. 1; Milloy, *Murder by Selection Committee*, Wash. Post, Nov. 24, 1987, at B3, col. 4.

120. 675 F. Supp at 653.
121. *Id.*
122. *Id.* at 654.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 652. *See also supra* note 17.
127. 675 F. Supp. at 655.
128. *Id.*

these factors, the "public interest" was best served by allowing the games to take place as scheduled.[129]

Although Howard was unsuccessful in its actions to delay or reorganize the championship tournament,[130] the court did note that Howard's case had merit.[131] Judge Penn stated that "based on the present record, there was a question as to whether the defendants followed their own regulations and the 1987 Football Handbook."[132] The 1987 Handbook states that the only criteria to be followed by a championship tournament Selection Committee are a school's "won-lost record, strength of schedule and eligibility and availability of student athletes for NCAA post-season competition."[133]

B. Allegations by Other Member Institutions and Conferences

The Howard incident is not an isolated one, although it is unique since legal action was actually taken. Another illustration of a member institution's concern over the selection process was the recent complaint by Stanford University (Stanford) and the Pacific-10 Conference (Pac-10) Commissioner concerning the NCAA's failure to select Stanford to participate in the 1988 Division I Men's NCAA Basketball Tournament.[134] Stanford, a member of the Pac-10 conference,[135] was not invited to the NCAA tournament, even though it had defeated the University of Arizona, a highly ranked team later invited to the tournament.[136]

In 1987, commentators expressed dismay at the omission of the 1986 NCAA champion, Louisville, from the NCAA basketball tournament.[137] Louisville felt that the Selection Committee did not invite them because its conference, the Metro Conference, allowed a school to participate in the conference championship tournament, even though the school was on NCAA probation.[138] Though Louisville was invited the following year, Coach Denny Crum continued his "crusade" to re-

129. *Id.*
130. *See supra* note 17.
131. 675 F. Supp. at 654.
132. *Id.*
133. NCAA EXEC. REGS. Reg. 1, § 5(g), NCAA MANUAL 1988-89, at 203 (1988).
134. *See* Shuster, *supra* note 10.
135. *Id.*
136. *Id.*
137. *See* Kirkpatrick, *supra* note 10.
138. *Id.*

form what he labelled a "subjective" selection process.[139]

The University of New Mexico also expressed dismay at its non-selection to the basketball tournament after two successive twenty-win seasons.[140] The team was invited to participate in the National Invitation Tournament (NIT), but the New Mexico coach indicated that he preferred not to go to what is generally considered a less prestigious tournament.[141]

The pending Howard case, the increasing number of complaints, and the potential revenues from tournament appearances indicate that the time may be ripe for an expansion of breach of contract remedies to include punitive damages. If there is an abuse of discretion, the member institutions harmed may have no other route for redress.[142] As the next section will discuss, any remedy beyond compensation would be extraordinary.[143] However, the damage that would be caused by a bad faith decision in the NCAA/member institution relationship may make such an award appropriate.

V
Damages

Courts generally award only compensatory damages for a breach of contract.[144] It is necessary to prove that the damages sought are foreseeable and can be identified with certainty.[145] However, if a bad faith breach of contract occurs, if the contract is between fiduciaries, or if there is a chance of undercompensation, the court may consider an expanded range of damage awards.[146] As has been noted, there should be no judicial intervention in a tournament selection decision unless

139. *See Room for Improvement*, USA Today, Mar. 14, 1988, at E1, col. 1.

140. *See* Carey, *supra* note 10.

141. *Id.* However, after meeting with the school's athletic director, Coach Gary Colson decided to accept the invitation to the NIT. *Id.*

142. *See supra* notes 88 and 89 and accompanying text.

143. *See, e.g.*, 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1338 (3d ed. 1968): "The general purpose of the law is, and should be, to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract." *See also* 5 A. CORBIN, CORBIN ON CONTRACTS § 992 (1964); RESTATEMENT (SECOND) OF CONTRACTS § 347 comment a (1981).

144. RESTATEMENT OF CONTRACTS § 342 (1932); 5 A. CORBIN, *supra* note 143, § 1077, at 438. For a history of the rule limiting awards to compensation, see Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-20 (1982).

145. *See infra* notes 149-84 and accompanying text.

146. *See infra* notes 185-220 and accompanying text.

the decision was made in bad faith or was otherwise illegal.[147] Since the NCAA may owe a fiduciary duty to its member institutions and because wrongful exclusion of a school from a championship tournament cannot be adequately compensated by traditional damage measures, the possibility of awarding punitive damages should be considered.[148]

A. Traditional Measure and Limitations

The law has long maintained that the remedy for a contract breach is compensation.[149] The compensation is equal to the injured party's expectation at the time the party entered into the agreement.[150] Damages beyond compensation traditionally have been reserved primarily for tortious acts.[151] In fact, the Restatement (Second) of Contracts maintains that punitive damages for a breach of contract may be awarded only if "[t]he conduct constituting the breach is also a tort for which punitive damages are rewardable."[152] The strongest supporters of the "compensation only" rule have been law and economics scholars.[153] They maintain that the decision to breach a contract is an economic one, and that the breaching party has complete knowledge of the cost of his or her actions. Thus, all contract decisions are made with nearly complete information. Awarding damages beyond compensation would remove a party's option of making an economic decision to either fulfill the obligations under a contract or to exercise an alternative option with knowledge of the fixed cost of the breach. Thus, a party's decision of whether or not to fulfill

147. *See supra* note 78.

148. To emphasize the point, there should be no judicial review unless elements of bad faith are present. Thus, anytime there is a judicial review of a tournament selection, punitive damages may be appropriate.

149. *See supra* note 144 and accompanying text.

150. E. FARNSWORTH, CONTRACTS § 12.8, at 839 (1982).

151. *Id.* at 842-43.

152. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981). Along these same lines, punishment is generally deemed not to be appropriate in contract actions, and clearly damages beyond compensation may be interpreted as punishment. *See, e.g.*, 5 A. CORBIN, *supra* note 143, § 1077.

153. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 93-95, 105-15 (3d ed. 1986); Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683 (1986). For specific criticism of the expansion of punitive damages into the commercial realm see Note, *Tort Remedies For Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing Into the Commercial Realm*, 86 COLUM. L. REV. 377, 402-06 (1986) (authored by Randy E. Barnett).

contractual obligations would necessarily be made with less than perfect information. The theory of "efficient breach" maintains that a party will breach only when there would be an efficient reallocation of resources.[154] The prevailing view among this school of thought is that when there is an efficient reallocation of resources, society as a whole benefits.[155]

The "punishment" inflicted by punitive damages traditionally is reserved for actions in tort.[156] In contrast with tort law, the law of contracts maintains that there is "no necessity for satisfying . . . feelings and allaying community resentment by fines or physical punishment."[157] Thus, punishment does not traditionally play a role in contract breaches, and damages are limited to the expectation interest under the contract.[158] Under this traditional measure of contract damages, a member institution may be prevented from recovering the full extent of its damages in a tournament selection action.[159] The factors which generally limit what a party may recover in a breach of contract action are the rules of foreseeability and certainty.

The foreseeability limitation on damages for breach of contract bars recovery by the plaintiff for damages that were not foreseeable at the time the contract was entered into.[160] This limitation is directed primarily at the problem of excessive damages.[161] A leading contracts scholar, Professor Farnsworth, explains that there are four elements examined in determining the foreseeability of damages.[162] First, it must be foreseeable that the loss would occur if the contract is breached.[163] Second, the party that breached must have been able to foresee the damages.[164] Third, reasonably foreseeable consequences are adequate; thus, damages are not limited to

154. Sebert, *supra* note 25, at 1572. This is referred to in economic terms as a "pareto-superior" allocation of resources. *Id.*

155. *Id.* at 1572-73.

156. RESTATEMENT OF CONTRACTS § 342 (1932); 5 A. CORBIN, *supra* note 143, § 1077, at 438. *See also* Sebert, *supra* note 25, at 1600 n.122.

157. 5 A. CORBIN, *supra* note 143, § 1077, at 438.

158. *See supra* note 144 and accompanying text.

159. *See infra* notes 210-220 and accompanying text.

160. *See* Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854); E. FARNSWORTH, *supra* note 150, § 12.14, at 873 (discussing "unforeseeability" as a limitation).

161. *See, e.g.*, Note, *Lost Profits As Contract Damages: Problems of Proof and Limitations on Recovery*, 65 YALE L.J. 992, 998 (1956).

162. *See* E. FARNSWORTH, *supra* note 150, § 12.14, at 876-77.

163. *Id.* at 876.

164. *Id.* at 877.

the consequences the defendant actually did foresee.[165] Finally, the probability that the loss would occur, as opposed to an absolute certainty, is sufficient.[166]

The relevant issue here is what damages are foreseeable in this tournament selection process. By focusing on Professor Farnsworth's elements, we find that many damages which may be suffered by a member institution are not foreseeable. Some examples include lost future revenues the school would have earned from the additional exposure to student athletes, students, potential contributors, and others.[167] Thus, the primary limitation on a traditional contract damages award is determining which types of damages are reasonably foreseeable and which are not.

Another limitation on damages that may be awarded for a contract breach is certainty.[168] The certainty doctrine originally required that damages "be shown by clear and satisfactory evidence, to have been actually sustained" and "be shown with certainty, and not left to speculation or conjecture."[169] Hence, the certainty limitation is primarily one of proof.[170] Although this certainty requirement continues to exist, it has been reduced over the years to a requirement of only "reasonable certainty."[171] The Restatement (Second) of Contracts notes that while extremely disproportionate damages may be limited because they were deemed to be unforeseeable, "[s]ometimes these limits are covertly imposed, by means of an especially demanding requirement . . . of certainty."[172]

Professor Farnsworth indicates that when the breach is "willful," the certainty requirement, or at least the proof of specific damages, is not as rigid.[173] There are some cases illustrating a relaxation of the certainty requirement. For example, in *Rombola v. Cosindas,*[174] the court held that a horse trainer could attempt to prove lost profits based on races a

165. *Id.*
166. *Id.* at 876.
167. *See infra* notes 210-20 and accompanying text.
168. E. FARNSWORTH, *supra* note 150, § 12.15, at 881.
169. Griffin v. Colver, 16 N.Y. 489, 491 (1858).
170. *Id.*
171. E. FARNSWORTH, *supra* note 150, at 882.
172. RESTATEMENT (SECOND) OF CONTRACTS § 351 comment f (1981).
173. *Id.*
174. 351 Mass. 382, 220 N.E.2d 919 (1966) (The court allowed an expert witness to present evidence to approximate the horse's future earnings based on its past earnings. *Id.* at 384).

horse would have run.[175]

If a jury does not determine damages with certainty in a breach of contract action, that jury's verdict may be set aside.[176] Awards of damages "must be certain, both in their nature and in respect to the cause from which they proceed."[177]

The certainty issue often arises in questions of lost profits.[178] The question of lost profits affects what damages may be awarded to a member institution excluded from a championship tournament. Courts have identified lost profits from a sporting event as generally not certain enough to recover.[179] For example, in *Chicago Coliseum Club v. Dempsey,*[180] the profits sought by the promoter of a fight were deemed to be too speculative.[181]

Under the traditional damage measure, the only lost profits that can be identified with certainty in a tournament selection action are the revenues awarded to a first round participant in any given tournament. A member institution wrongly denied participation in the NCAA Division I Basketball Tournament might be awarded the guaranteed first round sum of $239,635,[182] but foreseeability and certainty limitations would prevent a court from guessing how far a team would have progressed in that tournament had it participated.[183] Further, it is unlikely that a court would give a great deal of weight to evidence, from experts or otherwise, on how far it might have

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175. *Id.*

176. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 14-8, at 599 (1987).

177. Griffin v. Colver, 16 N.Y. 489, 495 (1858); *see also* J. CALAMARI & J. PERILLO, *supra* note 176, § 14-8, at 599-600.

178. *See also* A. CORBIN, *supra* note 143, §§ 1020-28 comment c; Comment, *Remedies—Lost Profits as Contract Damages for an Unestablished Business: The New Business Rule Becomes Outdated,* 56 N.C.L. REV. 693 (1978); Evergreen Amusement Corp. v. Milstead, 206 Md. 610, 618, 112 A.2d 901, 904 (1955).

179. Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932); Carnera v. Schmelling, 236 A.D. 460, 260 N.Y.S. 82 (1932).

180. 265 Ill. App. 542 (1932).

181. *Id.* at 550. However, a number of state courts are now recognizing that the issue of lost profits should be viewed as an evidentiary matter and base their decisions on whether there is enough evidence to show that the profits would have actually been earned if the contract had not been breached. *See, e.g.,* Pauline's Chicken Villa, Inc. v. Kentucky Fried Chicken Corp., 701 S.W.2d 399 (1985); Kenford Co. v. Erie County, 108 A.D.2d 132, 489 N.Y.S.2d 939 (1985), *aff'd,* 67 N.Y.2d 257, 493 N.E.2d 234, 502 N.Y.S.2d 131 (1986).

182. *See supra* note 4.

183. The process is certainly more speculative than forecasting the profits a business would have made. *See* E. FARNSWORTH, *supra* note 150.

progressed in a given championship.[184] Thus, the traditional law would bar a recovery in excess of first round revenues.

However, for several reasons, such an award may be severely inadequate to compensate an injured member institution. The revenues for participating in the tournaments are just a small part of the revenue that these institutions may expect to receive from the increased visibility of playing in a championship tournament. Where the NCAA makes a decision barring an institution from a championship tournament, one needs to consider what is at stake. Clearly, large quantifiable television and ticket revenues are lost, but additional consequential damages are also incurred. Calculating such damages, however real, presents a problem under existing contract theories. As a result of conventional ideas of contract damages, a member institution which is not selected to a tournament is unlikely to recoup all losses suffered due to the NCAA's breach of the NCAA/member institution contract.

B. Punitive Damages

The bad faith nature of a breach, the fiduciary relationship of the member institution and the NCAA, and the potential for undercompensation may make an award of punitive damages appropriate for a breach of contract by the NCAA. But, as discussed below, the strongest justification is the possibility of gross undercompensation under traditional damage computation.

1. Bad Faith

Generally, the covenant of good faith and fair dealing requires that each party to a contract (1) substantially perform contractual obligations, and (2) avoid undermining the rights of the other party to enjoy the benefits of the contract.[185] A bad faith breach occurs when either prong of this covenant is violated. Good faith in the NCAA/member institution relationship requires adherence to their contract, set forth in their

184. *See* E. FARNSWORTH, *supra* note 150.

185. *See, e.g.*, Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 379, 384 n.65 (1980); U.C.C. § 1-203 (1987); Seaman's Direct Buying Serv. v. Standard Oil Co., 36 Cal. 3d 752, 768, 686 P.2d 1158, 1166, 206 Cal. Rptr. 354, 362 (1984); San Jose Prod. Credit Ass'n v. Old Republic Life Ins. Co., 723 F.2d 700, 703 (9th Cir. 1984).

constitution and bylaws.[186]

The concept of bad faith breach has been most widely promulgated in insurance cases. The failure of an insurance company to pay the claim of an insured, or even to pay in a timely manner, has been held to constitute a bad faith breach and to allow the plaintiff to recover punitive damages.[187] The relationship of the parties, especially the unequal bargaining power at the formation of the contract, is one reason for such a result.[188]

In some jurisdictions this cause of action has expanded beyond the insurance context.[189] A leading case for the proposition of expanding punitive damages to contract breaches outside the insurance industry is *Seaman's Direct Buying Serv. v. Standard Oil Co.*[190] The case involved a contract dispute between Standard Oil and a ship fuel supply dealer. Seaman's brought this successful action when Standard Oil attempted to deny the existence of a contract between them.[191] The California Supreme Court affirmed the proposition that there is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.[192] The court recognized that punitive damages for bad faith contract breaches may be available due to the special relationship that exists between insurance companies and the insured.[193] The court further noted, however, that in cases with "similar characteristics," punitive damages may be available as well. Although the court did not state specifically what these "similar characteristics" might be, it did cite "fiduciary responsibility" as a possible element.[194]

A major reason that punitive damages have been allowed

186. *See supra* notes 110-113 and accompanying text.

187. *See, e.g.*, Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 105 (1967).

188. The fact that colleges have little choice but to join the NCAA if they desire to participate in major college sports illustrates the unequal bargaining power at the formation of the contract. *See supra* note 57 and accompanying text.

189. *See, e.g.*, Seaman's Direct Buying Serv. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

190. *Id.*

191. *Id.* at 762, 686 P.2d at 1162, 206 Cal. Rptr. at 358.

192. *Id.* at 768, 686 P.2d at 1166, 206 Cal. Rptr. at 362.

193. *Id.* at 768-69, 686 P.2d at 1166, 206 Cal. Rptr. at 362.

194. *Id.* at 768, 686 P.2d at 1166, 206 Cal. Rptr. at 362.

for bad faith contract breaches is their deterrent effect.[195] The general feeling is that individuals or entities will consider the potential economic harm to themselves before they violate the law. The theory is that the increased economic harm for bad faith will deter such breaches.[196] Applying this analysis to the tournament selection scenario, the possibility of punitive damages should compel the selection committees to make sure that their selection decisions are fair.

2. Fiduciary Breach of Contract

As the discussion in part I noted, there is much to indicate that the NCAA/member institution relationship is a fiduciary one.[197] A fiduciary is defined as "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires."[198] Two specific sources of the fiduciary relationship between the NCAA and its member institutions are the NCAA constitution and bylaws. The bylaws state that member institutions agree to abide by the rules; the NCAA, among other things, agrees to conduct national championship tournaments "among the best eligible . . . teams . . . ."[199] Thus, the member institutions place their trust in the NCAA to select championship tournament participants.

In professional sports, courts have found that the relationship between the individual franchises and the professional league, the counterparts of the member institutions and the NCAA, are close enough to be fiduciary in nature. In *Professional Hockey Corp. v. World Hockey Ass'n*[200] the court ruled that the member franchises involved owed each other fiduci-

195. *See generally* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

196. An obvious problem in applying this deterrence justification to an NCAA breach is that the bad faith action may be by individual committee members who do not directly feel the economic harm to the entity as they would if it were a penalty assessed against them individually. However, the threat of such a penalty should have some incremental effect on the individual committee members. *See, e.g.*, Metzger, *Organizations and the Law*, 25 AM. BUS. L.J. 407 (1987); C. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975).

197. *See, e.g.*, Palmer v. Fuqua, 641 F.2d 1146 (5th Cir. 1981); Brown v. Coates, 253 F.2d 36 (D.C. Cir. 1958).

198. BLACK'S LAW DICTIONARY 562 (5th ed. 1979)

199. *See* NCAA EXEC. REGS. Reg. 1, § 2(a), NCAA MANUAL 1988-89, at 191 (1988).

200. 143 Cal. App. 3d 410, 191 Cal. Rptr. 773 (1983).

ary duties.[201] The California Court of Appeals stated that "there is a duty of loyalty which requires directors-trustees not to act in their own self-interest when the interests of the corporation will be damaged thereby."[202] This same rule against self interest appears to be applicable in the tournament selection process.

This interdependence gives further strength to a finding that the NCAA member institution relationship is fiduciary in nature. One commentator noted:

> An examination of the jurisprudential origins of fiduciary obligations is particularly instructive.
>
> Why do fiduciary duties arise in brokers, corporate directors, lawyers and others? Is the duty essentially contractual: the putative fiduciary promised to do the job and hence must do it right? I think not. A more consistent theory is that the fiduciary duty arises because of the fact of the beneficiary's dependency, or conversely, the fiduciary's extraordinary control . . . . As the former's dominance can be used for good or ill, a principle is needed to insure that in instances in which the proper course of action is otherwise uncertain, the fiduciary will show appropriate responsibility.[203]

Outside the sports context, there is precedent to support the contention that breach of contract between fiduciaries is proper grounds for awarding punitive damages. These cases involve real estate brokers, partners, and trustees.[204] The Fifth Circuit case of *Palmer v. Fuqua*[205] involved an action brought by members of a partnership against one of the partners for the taking of a partnership opportunity. The limited partners claimed that the general partner had taken property for his individual use without offering the opportunity to the partnership first.[206] The court found that the partner breached his fiduciary duty in taking the partnership property.

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201. *Id.* at 415, 191 Cal. Rptr. at 777.

202. *Id.* The case involved an approval of a sale by the World Hockey Association Board of Trustees.

203. Weistart, *supra* note 27, at 173.

204. *See, e.g.*, Palmer v. Fuqua, 641 F.2d 1146 (5th Cir. 1981) (general partner breaches fiduciary duty to partnership); Brown v. Coates, 253 F.2d 36 (D.C. Cir. 1958) (real estate agent breaches fiduciary duty); Youngblood v. Mock, 143 Ga. App. 320, 238 S.E.2d 250 (1977) (agent selling equipment converts equipment to own use); Kirby v. Cruce, 688 S.W.2d 161 (1985) (punitive damages awarded for breach of fiduciary duties to other members of joint property venture).

205. 641 F.2d 1146 (5th Cir. 1981).

206. *Id.* at 1152.

Based on the breach of fiduciary duty, the court held that awarding punitive damages against the general partner was proper.[207]

The court in *Palmer v. Fuqua* applied Texas law, which recognized a cause of action for punitive damages for breach of contract in certain instances, including those which involve a breach of fiduciary duty.[208] Thus, when a partner breaches a contract, he or she also breaches a fiduciary duty. Again, the relationship of the parties is the important factor.[209] Although the NCAA and member institutions are not partners, it does appear that their relationship is fiduciary in nature and that a similar decision in a bad faith tournament selection case would be appropriate.

The deterrence of bad faith decisions alone may not be enough to justify punitive damages in the NCAA/member institution relationship. However, if deterrence is joined by the potential for undercompensation, there is an even greater justification for a punitive damage award.

3. Undercompensation

Commentators have illustrated that in many classic commercial contract cases the plaintiff is undercompensated by the traditional contract remedy awarded.[210] The reason generally cited for this undercompensation is the law's determination to award only those damages which were foreseeable and identifiable with certainty at the time the contract was formed.[211] The undercompensations most often cited by commentators are the general costs of litigation, attorneys' fees, and prejudgment interest.[212]

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207. *Id.* at 1161.

208. *Id.* at 1160-61.

209. *Id.*

210. *See, e.g.*, Sebert, *supra* note 25, at 1573-84; Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1444-45 (1980). Professor Sebert argues strongly that undercompensation may have as negative an effect as overcompensation (overcompensation being part of the economic argument against punitive damages). His view relates to the ability to make economic decisions to breach in the commercial context. Sebert, *supra* note 25, at 1573. *But c.f.*, Note, *Reconstructing Breach of the Implied Covenant of Good Faith and Fair Dealing as Tort*, 73 CALIF. L. REV. 1291, 1296 (1985) (asserting that "[t]ort damages already remedy the inadequate compensation deterrence of contract damages").

211. *See supra* note 164 and accompanying text.

212. *See* Sebert, *supra* note 25, at 1578.

In the context of a member institution not selected to participate in a tournament, it is possible only to a limited degree to calculate the school's prospective share of television and ticket revenues.[213] Obviously, the financial rewards to a member institution eliminated in the first round are less than that for a school that is a tournament champion. A court would probably be reluctant to award to a school anything beyond the shares paid to schools that lose in the first round, or at best the average for all tournament participants. Either amount would probably fall short of the financial benefits a championship tournament participant actually receives.

Coupled with this problem of forecasting the success of a school in a championship tournament are a number of other potential income opportunities for member institutions. When Temple University competed in the 1988 NCAA basketball tournament, they reportedly experienced a fifty percent increase in campus visits and a thirty-three percent increase in admissions applications over the previous year.[214] Temple also anticipated souvenir sales to total $500,000.[215] There is no traditional legal basis for a university to recover the financial losses for these items because they cannot be identified with certainty. No damages could be awarded for the lost exposure to alumni who might have been encouraged to make contributions to the school due to its participation in the playoffs.[216]

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213. In addition to the problem of knowing how far a team would have advanced against the competition, the level of income the school would have earned from ticket sales and fees paid by advertisers may fluctuate based on the schools that are involved. For example, a school from a major media market such as Los Angeles or New York would probably attract more viewers, fans, and potential consumers than a school from a different market.

214. Sports Industry News, Apr. 1, 1988, at 102.

215. *Id.*

216. There is evidence pointing in both directions as to whether contributions to an institution increase due to superior athletic performance. Studies concentrate either on the effect on contributions to the athletic program, or to the university generally. *See generally* Bergman, *Do Sports Make Money for the University,* FOOTNOTES (Spring 1988) (discussing the general assumption that contributions increase); *Do Winning Teams Spur Contributions? Scholars and Fund Raisers Are Skeptical,* The Chron. of Higher Educ., Jan. 13, 1988, at 32-34, col. 1 (discussing several studies that have been done and asserting that anecdotes regarding increased contributions may well be exceptions); *Gifts, Applications Rise at Witchita State After Its Losing Football Team Is Dropped,* The Chron. of Higher Educ., Jan. 13, 1988, at 33, col. 1 (reporting that enrollment increased by 200 students and contributions jumped from $13.5 million to $25.5 million once the football program was dropped); Krupa, *Profiting From Losses,* SPORTS INC., Aug. 29, 1988, at 32 (noting that Columbia University alumni donations to the athletic program have increased "[d]espite, or perhaps be-

Recruitment of prospective student athletes may be affected as well.[217] Temple star basketball player, Mark Macon, stated that he learned of Temple's program by watching the school on television in the previous year's tournament.[218] Furthermore, individual team members lose the opportunity to attract the attention of professional scouts. It may be that an improved level of performance or a strong performance against strong competition sparks a professional team's interest in a student athlete. Member institutions suffer, as well as the student athlete, if this occurs, since the school loses the benefits their former students' professional careers could bring, such as the increased level of exposure and the unquantifiable value of being considered "big time."

Although difficult to quantify, the monetary losses involved in losing an opportunity to compete in an NCAA championship tournament are obviously very large.[219] A certainty or foreseeability defense would probably bar recovery of most of these items under traditional damage rules.[220] Punitive damages, however, would provide the plaintiff member institution with some compensation for these additional damages. These damages would not be available unless the action by the NCAA was proven to be in bad faith. Clearly, the value of added tuition, notoriety, and recruitment of a key student-athlete cannot be quantified. However, awarding punitive damages would help to compensate the member institution for those losses.

Conclusion

Courts should continue to stay out of the affairs of private

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cause of, its [41 game] losing streak"). For specific studies see, e.g., Coughlin & Erekson, *Contributions to Intercollegiate Athletic Programs: Further Evidence,* 66 SOC. SCI. Q. 194 (March 1985) (concluding that football success increases contributions but that football attendance is an even more "powerful" variable, *id.* at 202); Sigelman & Bookheimer, *Is It Whether You Win or Lose? Monetary Contributions to Big-Time College Athletic Programs,* 64 SOC. SCI. Q. 347 (June 1983).

217. *See* George, *Chaney's Playbook: His Life,* N.Y. Times, Mar. 14, 1988, at C1, col. 1.

218. *Id.*

219. In addition to the clearly-defined revenues, recruitment, and other monetary benefits, see Rhodes, *Wildcats Put Their School on the Map,* N.Y. Times, Apr. 1, 1988, B9, col. 1 (noting that a significant benefit to the University of Arizona as a result of participating in the NCAA tournament was the public finally distinguishing their institution from nearby Arizona State University).

220. *See supra* note 162 and accompanying text.

associations except in the case of illegal or bad faith actions. The possibility of intervention alone should assure closer adherence to a given organization's constitution and bylaws. The possibility of intervention can only serve to maintain a level of integrity in the governance of college sports. Without the possibility of intervention by courts, member institutions who have been harmed by the NCAA would not be able to obtain recourse in private law areas such as contracts.

It is difficult in any contract situation to prevent contracting parties from acting in bad faith. However difficult it may be to impose such standards on an individual, it is even more difficult to change the behavior of an organization such as the NCAA. Although the concept that the behavior of an organization is difficult to control would somewhat negate the deterrent justification for punitive damages, it has no bearing on the undercompensation theory. Even so, the deterrent effect of such an award cannot be completely discounted. If the availability of punitive damages deters one bad faith decision, that is a clear improvement over the state of governance in college sports today. This dual effect of deterrence and adequate compensation would seem to justify an award of punitive damages in this type of contract breach.

The problems challenging the NCAA are complex. The exclusion of a member institution from a revenue producing tournament is but one of the many issues that confront this college sports governing body.[221] The contract law analysis examined in this Article may be appropriate, as well, for other NCAA actions negatively affecting member institutions and student-athletes.[222]

221. *See, e.g., supra* note 14.
222. *See, e.g., supra* note 17.